



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: W.M. Schlosser Company, Inc.

File: B-258284

Date: December 12, 1994

Michael J. Cohen, Esq., for the protester.
Douglas L. Patin, Esq., Spriggs & Hollingsworth, for
John J. Kirlin, Inc., an interested party.
Terrence J. Tychan, Department of Health and Human Services,
for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody,
Esq., Office of the General Counsel, GAO, participated in
the preparation of the decision.

DIGEST

Awardee's failure to submit requested equipment history with bid does not render bid nonresponsive where history was not necessary to evaluate bids, awardee was bound to perform in accordance with the solicitation, and awardee did not gain any competitive advantage over other bidders who submitted the information in question.

DECISION

W.M. Schlosser Company, Inc. protests the award of a contract to John J. Kirlin, Inc. under invitation for bids (IFB) No. 263-94-B(CP)-0427, issued by the National Institutes of Health (NIH), Department of Health and Human Services, for the installation of two air conditioning chillers and related equipment in Building 11 on the NIH Campus in Bethesda, Maryland. Schlosser contends that the agency should have rejected Kirlin's bid as nonresponsive because Kirlin failed to submit certain required information with its bid.

We deny the protest.

The solicitation requested lump-sum bids for the installation of two water chillers and related cooling system equipment, including cooling towers. The cooling towers were to be manufactured by one of four named companies or an approved equal. The section of the specification concerning the towers instructed bidders to submit with their bids a 5-year history of the proposed equipment, including a listing of its applications and

successful installations. The immediately following paragraph of the specification calls for the submission, by the awardee, of precisely the same information--as well as other information pertaining to the cooling towers, such as shop drawings and product performance data--to the contracting officer for approval in accordance with section 01340 of the specification ("Samples and Shop Drawings"), i.e., after issuance of a notice to proceed.

Six bids were received by the August 18, 1994, opening date. Kirlin's price of \$15,980,000 was low and Schlosser's price of \$16,222,000 was second low. Kirlin did not include a history of its proposed cooling towers with its bid. Schlosser protested the omission to our Office on August 24. By memorandum dated September 16, the agency notified us that it had determined to proceed with award to Kirlin notwithstanding the protest due to urgent and compelling circumstances.

The protester argues that the agency should have rejected Kirlin's bid as nonresponsive because it did not include the requested equipment history for the cooling towers. Schlosser maintains that this information was requested to enable the agency to assess the suitability of a bidder's proposed cooling towers prior to award. The agency responded that it did not intend to determine the suitability of any particular equipment prior to award and that the paragraph upon which the protester relies was included in the solicitation by mistake.

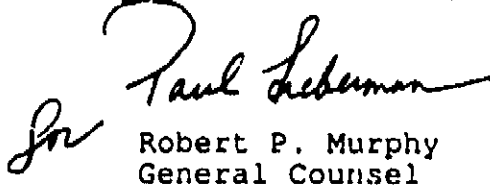
Responsiveness concerns whether a bidder has unequivocally offered to provide supplies and services in conformity with the material terms and conditions of the solicitation. Robbinsville Contracting Co., B-220209, Nov. 29, 1985, 85-2 CPD ¶ 616. Although as a general rule, a bid must be rejected as nonresponsive when it does not strictly comply with the solicitation's requirements, including requirements for information, this rule does not apply to deviations which are immaterial or which concern matters of form rather than substance. Federal Acquisition Regulation § 14.405. Instead, we have consistently held that bids should not be rejected for failure to furnish information if the information was not necessary to evaluate bids and bidders would be bound to perform in accordance with the solicitation. Robbinsville Contracting Co., supra.

Here, by submitting a price without taking exception to any of the IFB's terms, Kirlin offered to perform in accordance with the solicitation's requirements, and submission of an equipment history for its proposed cooling towers was not necessary to establish the bid's responsiveness. It is clear--both from the fact that the agency requested the submission of no information concerning the cooling towers,

other than the equipment history, with bids, and from the position taken by the agency in response to this protest (i.e., that the paragraph requesting submission of the information with bids was included in the solicitation by mistake)--that the agency did not intend to determine the suitability of any particular type of cooling tower prior to award.¹ Further, since the solicitation did not indicate what constituted an acceptable prior history (such as the minimum number of prior successful installations), it is unclear how this information could have been used to evaluate a bid's responsiveness. Compare Sunsav, Inc., B-205004.2, Nov. 29, 1982, 82-2 CPD ¶ 476, where the solicitation required the submission of information demonstrating that a manufacturer had produced a minimum of 1,000 units in successful operation in commercial installations. Finally, we see no basis to conclude, and the protester does not argue, that Kirlin gained any competitive advantage as a result of not submitting the equipment history.

Since submission of an equipment history for the cooling towers that Kirlin intended to install was not required to establish the responsiveness of its bid, Kirlin's failure to furnish this information with its bid did not require rejection of the bid.

The protest is denied.


Robert P. Murphy
General Counsel

¹This position is supported by the statement in amendment No. 1 to the IFB that:

"Numerous inquiries have been made regarding approval of various products. The government will not provide pre-approval of any specific product. The contractor shall be responsible for determining compliance with project specifications."